IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO. 127 OF 1995

Smt. Kusum Sagun Malmanke,
Aged a out 36 years,
(presently in Sangli Dist.Jail) .. Appellant
(Orig.Accused
No.1)

V/s.

The State of Maharashtra ..Respondent.

Shri Prashant D. Patil holding for Shri Ranjit V. More for the appellant.

Shri D.R. More,A.P.P. for the State/Respondent.

CORAM : S.S. PARKAR, &
ANOOP V.MOHTA, JJ.
DATE : 19TH APRIL, 2005.

ORAL JUDGMENT (**PER ANOOP V. MOHTA, J.)**

. The appellant-accused no.1 was charged for the offences punishable under Section 201, 302 r/w section 34 of Indian Penal Code (IPC), along with the original accused Nos. 2 and 3. By an impugned Judgment and order dated 5/12/1994, the Additional Sessions Judge, Sangli, has convicted the appellant for the offence charged under Section 302 of IPC and acquitted accused Nos. 2 and 3. Therefore, this appeal against the order of conviction and sentence to undergo imprisonment for life.

2. The appellant is the mother of Kumar (Accused No.2) and Parshuram (accused No.3). The appellant married to Sagun Tatoba Malmanke (the deceased husband). This was her second marriage. Above two accused, Laxmi (the deceased daughter) and P.W.10 Renuka and P.W. 9 Deepak borned of her first marriage. The appellant therefore, on the date of incident dated 27/1/1994, was the mother of 3 sons and 2 daughters. All were residing together with the deceased in the house situated at Miraj.

3. The deceased daughter, Laxmi had illicit relations with the deceased husband, Sagun. Eight days prior to the date of incident, the deceased Sagun and the deceased Laxmi had left the house and they were roaming around in the village. On 26/1/1994 at about 9 p.m.,P.W. 9 Deepak had noticed them. The appellant rushed there and noticed Mangalsutra around the neck of the deceased Laxmi and when enquired, they informed about their marriage. However, the appellant brought them to the house in Rickshaw, which was noticed by the neighbour, P.W. 4, Gopal. At about 1 a.m. on 27/1/1994, Gopal (P.W. 4) heard noise of quarrel from the house of the accused and the deceased. As such

quarrels were routine and as it was also stopped, Gopal P.W. 4 alongwith other neighbourers returned back to their respective homes. The appellant after 2 hours, on the same day at about 3 a.m. knocked the door of Gopal, P.W. 4 and requested him to accompany her to the police station. The appellant had also asked one Narsu, another neighbour, to accompany her to the police station. The appellant picked up an blood stained axe, which was kept in the corner of her house. They went to the rickshaw stand by walking . The appellant informed that, she along with her son accused Nos. 2 and 3 had assaulted the deceased husband Sagun and deceased daughter Laxmi with an axe, gupti, knife, and wooden handle and killed them. The clothes of the appellant were stained with the blood. They went to the Miraj Police station by Rickshaw. P.W. 4 and Narsu returned back from the compound of Police station, whereas the appellant went inside the police station. P.W. 14, Madan, Police Inspector, reduced into writing her report Exh.33 at about 4.45 a.m. The appellant put her thumb-impression and it was also endorsed by P.W. 14. Therefore, on 27/1/1994, offence was registered as charged. The blood stained axe, brought by the appellant, which was used for the commission of crime

was seized in presence of P.W.8, Panch Mustak Jamadar under the panchanama Exh.14.

4. P.W. 14 Madan, P.I. visited the spot and noticed both the dead bodies in the residential house of the accused. The dead body of Sagun was naked. There were several injuries on the head, as well as, vital parts of both the dead bodies. The inquest panchanma was drawn Exh.8 and 9. The photographs were taken Exh. 25 in presence of P.W. 1, Kadar Babu Sayyed. The panchanma Exh.12 was drawn by P.W. 14. Several other articles including knife, gupti, wooden handle scattered and lying on the ground were also seized. Both the bodies were sent for post mortem examination to Civil Hospital,Sangli. Dr. Sanjay S. Bhave (P.W. 15) (M,.O.), conducted the post mortem examination on both these dead bodies. The report and letter Exh.47, 48 and death certificates and letter Exh.49 and 50 are on the record. The blood stained clothes, blouse, saree and petticoat were also seized in presence of PW.3 Bharat Gurav by P.W. 14, P.I. Chavan. The statements of the witnesses were recorded.The articles seized were sent to the Chemical Analyser for examination. The Chemical Analyser’s report is filed on the record. P.W. 16,

Shri Jadhav, Special Judicial Magistrate recorded the statement under Section 164 of Cr.P.C. of P.W. 9 Deepak Malmanke (Exh.55). The charge sheet against all the accused including the appellant was filed. The charges were framed against all the accused. All the accused have denied the charges levelled against them and pleaded not guilty and claimed for the trial. The prosecution has examined 15 witnesses. No defence witness was examined. The statements, under Section 313 of Cr.P.C. of each accused, were recorded vide Exh.2,3, and 4.

5. The learned Judge after considering the evidence and material placed on the record, acquitted the original accused Nos. 2 and 3. The appellant-original accused No.1 was acquitted for the offence punishable under section 201 of IPC but convicted for the offence punishable under Section 302 r/w 34 of IPC and sentenced her to undergo imprisonment for life and to pay fine of Rs. 5,000/-, in default to undergo further rigorous imprisonment for one year.

6. Heard Shri Prashant D. Patil, the learned Counsel for the appellant and Shri D.R. More, the

learned A.P.P. for the Respondent/State. The appellant's Counsel has relied on **1989 Supp. (2) SCC 147** (**Ajit Singh V. State of Punjab)** and basically, submitted that the offence was committed by the appellant in grave and sudden provocation, as she found her second husband and her own daughter from first husband, in compromising position and therefore, submitted to consider the provisions of Section 304 (I) of IPC in the facts and circumstances of the case. He has also relied on **1993 Supp. (1) SCC 719 (Raghavan Achari Alias Njoonjappan V. State of Kerala)**. The learned A.P.P. has supported the Judgment and order on all counts and submitted to maintain the same.

7. After considering the material, as well as, the evidence on the record, we are also of the view, that the appellant, in the facts and circumstances of the case, under grave provocation, murdered her second husband, Sagun and her own daughter, Laxmi (from her first husband), as they had developed illicit relations and at the relevant time at midnight on 26/1/1994, the appellant had seen them in compromising position. There is no much dispute about the death of both the deceased on the spot, because of severe injuries on the vital

parts of the bodies of the deceased, caused by, the duly seized blood stained axe, by the appellant. The original accused Nos. 2 and 3 were acquitted and there is no counter appeal by the State against the order of acquittal. The acquittal order therefore, remained intact. The prosecution has proved beyond doubt that the appellant assaulted and killed the deceased Sagun and Laxmi. The post mortem report, certificate of Doctor and multiple injuries, as recorded and observed by the learned Judge also support the prosecution. The learned Judge has convicted appellant by holding that there was predetermination and design and based on that the said offence was committed. Therefore, discarded the defence of sudden and grave provocation.

8. The spot panchanma Exh.10, Scene of offence Exh.12,A inquest panchanma Exhs. 9 shows that the dead body of the deceased Sagun was naked. The illicit relation of the deceased must be bothering the appellant. Both the deceased were away from home for some days. The appellant's son Deepak noticed them in the garden and they were brought back to the house in question. There was quarrel at about 1 a.m. between 26/1/1994 and 27/1/1994 and it was noticed by the by

Gopal (P.W. 4). The Mangalsutra around the neck of the deceased Laxmi and open declaration about their marriage with the second husband was also troubling the appellant. Their such illicit relations cannot be said to be normal circumstance for the appellant at the relevant time. Above this, on the same night, when she saw her second husband Sagun in compromising position with the eldest daughter Laxmi, that must have provoked her to commit such crime. Merely because, some knife was purchased on the same date that itself cannot be the reason to hold that there was conspiracy or plan to commit the crime in question.

9. One cannot over look, in this back ground, the mental condition of the appellant, specially, when the appellant has 2 unmarried daughters and 3 unmarried sons staying together at the relevant time. Whatever may be the circumstances, there is no doubt that she had committed this heinous crime, but immediately made the confession and got arrested herself in the police station on 27/1/1994. The appellant-accused before reaching to the Police Station, when enquired, informed to Gopal, P.W. 4, about the crime and as suggested by him she went to the police station, and informed the

same also to the police.

10. The learned Judge, rightly came to the conclusion that, the confession made before the police officer (P.W. 14) by the accused, cannot be used against her, in view of the bar created under Section 25 of the Evidence Act. The Apex Court in **AIR, 1966 S.C. 119" (Aghnoo Nagesia Vs. State of Bihar)** has held that such admission of an incriminating fact including all other admission of related incriminating fact of the offence, fall within the purview of section 25 of Indian Evidence Act. The same is reiterated in **1972 Cr.L.J. 626 (Khatri Hemraj Amulakh Vs. The State of Gujrat).** The Apex Court has observed in the same Judgment as follows.

> "The part of the information as related distinctly to the fact discovered in consequence of the information could also be admitted into evidence under Section 27 of the Indian Evidence Act, if the other conditions of that section were satisfied."

The learned Judge therefore, rightly relied on Exh.33, the FIR lodged by the appellant, by considering the provisions of section 8 of the Indian Evidence Act, in reference to the conduct of the appellant including

visiting the police station on her own accord and made the report. The information given by the appellant, which is followed by the seizure of the blood stained axe (Exh. 14) can be taken note of. The testimony of P.W. 4, Gopal; P.W. 14, P.I, Madan Chavan (Exh.33) and in addition to that statement made by he appellant under Section 313 of Cr.P.C. was rightly relied and considered by the learned Judge. In view of the corroboration of this material particulars, we are also of the view, that the prosecution has proved the links of the events against the appellant. The panch, Mustaq, P.W. 8 of the panchanama Exh. 14, also support the fact that in his presence P.W. 14, I.O. had seized blood stained axe from the appellant. The contents of FIR Exh.33, and all these aspects are also rightly relied upon. We cannot over look the fact of recovery of the weapon (blood stained axe) from the possession of the appellant and as the same was also independently established by the evidence of P.Ws. 4, 8 and 14.

11. The prosecution according to us and as observed by the learned Sessions Judge has proved the Commission of the offence by the appellant and her effective participation in the said offence. Apart from the extra

Judicial confession by the appellant to P.W. 4, there are corroborative evidence, independently, on the record, to support the said extra judicial confession made by the appellant. The possibility of disclosing this fact to P.W. 4, who was at the relevant time was neighbourer, cannot be discarded. There is a observation by the learned Judge also that the appellant was prostitute and the acquaintance of the appellant with Gopal was not unnatural. Gopal (P.W.4) was staying with his keep in the neighbouring house. The immediate conduct of the appellant, after committing the crime and asking for help from P.W.. 4 and one other neighbour cannot be discarded.

12. There is no doubt that such confessional statement cannot be the basis of conviction, and or even also the extra judicial confession, unless, it is corroborated by the other piece of evidence. In the facts and circumstance of the case, we are of the view, that the corroborative circumstances are also against the appellant. Merely because, P.W. 9, Deepak son the appellant; P.W. 10, Renuka, daughter of the appellant were declared hostile, still, as both these witnesses, as observed rightly by the learned Sessions Judge, have

deposed in their examination-in-chief, the facts prior to the incident, specially, the fact that Deepak ,P.W. 9 noticed both the deceased Sagun and Laxmi in Ambedkar Garden, Miraj, and they were absent from the house for more than 8 days. Based upon the said information, the appellant with others went to the spot and brought both the deceased to the house on 26/11/1994. P.W. 4 (Gopal) noticed that the deceased Sagun and Laxmi and appellant alighted from the rickshaw on 26/1/1994 at about 3 p.m. This fact was corroborated by P.W. 9, Deepak and P.W. 10, Renuka, who were also residing along with the deceased and the appellant in the same house. This circumstantial evidence therefore, also linked the prosecution case.

13. The presence of original accused Nos. 2 and 3 was not supported and or proved by any of the witnesses.

14. On 27/1/1994 at about 3 a.m., as noted above, P.W. 4, Gopal on the request of appellant accompanied her upto the compound wall of the police station. P.W. 12 also gave drinking water to the appellant and asked her husband, Narsu to accompany her. The blood stained clothes, blood stained weapon i.e. axe which were

seized from appellant. No.1. The Chemical Analyser's reports Exh.37 to 40 disclose that the blood group of the deceased was found on the seized blood stained clothes, apart from the clothes of the appellant and the axe. All these corroborative evidence, therefore, connect the appellant with the crime. P.W. 15, Dr. Sanjay, Medical Officer, who examined the dead bodies also in his post mortem notes Exh.47 and 48 supports 21 injuries on the person of deceased Sagun and 17 injuries on the person of deceased Laxmi. These injuries were caused by sharp and cutting object.

15. The learned Judge, however, merely relied on the evidence of P.W. 7, Mohinuddin, who deposed that in the night on 26/1/1994 at about 9 p.m. the appellant had been to his house and wanted to purchase a knife. But as the shop was closed, he offered her a gupti and the appellant had purchased the same, for her own security, as she had to travel to Karnataka. The murder was committed at about 1 a.m. The basic injuries on the person of both the deceased, as per post- mortem reports Exh.47 and 48 were on the vital part i.e. head, chest and were with the axe. The gupti was also recovered from the spot, under the panchanma, which was identified

by P.W.7, but the gupti was not blood stained. According to us purchase and recovery of Gupti from the spot that itself cannot be sufficient to accept the prosecution case and reasoning given by the learned Judge that the appellant had predetermined and designed to kill and or assaulted both the deceased. There is nothing material on the record to show that the gupti in question was used in the commission of offence, as observed by the learned Judge, himself in para 29.

16. The learned Judge according to us, right in his reasoning in holding that the appellant had committed the crime in question and the prosecution has proved the same. However, in the facts and circumstances of the case, we are convinced that the appellants statement under section 313 of Cr.P.C. read with other corroborative evidence that the appellant had committed the crime, because of out come of grave and sudden provocation. We are of the view, that there was no pre-designed act or pre determined plan to commit the offence in question. We are of the view, that in the totality of the circumstance, there is an ample material on the record to show that the grave and sudden provocation was the main reason to commit such offence

by the appellant. In the facts and circumstance of the case, the learned Judge was wrong in observing that burden to discharge rests upon the appellant, that she had received grave and sudden provocation at the hands of her husband Sagun and daughter Laxmi and therefore, she made assault in such state of mind. The learned Judge, according to us, was also wrong by observing that she did not choose to adduce any evidence in her defence to establish the facts of receiving grave and sudden provocation. We are of the view, after evaluating the evidence on the record and in the facts and circumstances of the case, that the appellant had committed the crime in question, because of sudden

provocation.

17. The Apex Court in **Raghavan Achari** (Supra) acquitted the accused as that was the case of self defence, as the accused had caused grievous injuries to the appellant first and the appellant having seen the deceased in compromising position with his wife, and therefore, in this background the appellant had inflicted with the chopper, which resulted into the death of the deceased. In that circumstances, the Apex Court has acquitted the appellant by giving the benefit of section 100 of IPC. The facts are distinct in the present case.

18. Therefore, after considering the material on the record, we are accepting the submissions made by the learned Advocate appearing for the appellant based upon the Apex Court’s decision **(Ajit Singh) (Supra)** that the appellant had acted under grave and sudden provocation, therefore, the offence committed by her falls within the ambit of Section 304(1) of I.P.C.

19. The appeal is partly allowed.

. We are therefore, quash and set aside the conviction for the offence punishable under section 302 r/w section 34 of IPC. The offence committed by the appellant according to us fall within the ambit of section 304(I) of IPC. Therefore, a sentence of 8 years rigorous imprisonment would meet the ends of justice. The order is modified to this extent. The appellant is entitled for the set off, for the period, which she has already undergone. The appellant shall surrender to her bail bond forthwith.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]